

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

DWAYNE L. JOHNSON, (#1059153),

Petitioner,

v.

CIVIL ACTION NO. 2:23cv553

COMMONWEALTH OF VIRGINIA,

Respondent.

REPORT & RECOMMENDATION FOR DISMISSAL

Johnson originally filed his claims under 42 U.S.C. § 1983. See Johnson v. Commonwealth of Virginia, No. 2:23cv312. After review of his filings, the court determined that the only relief Johnson seeks is an order vacating one or more of his state convictions or sentences. Accordingly, on October 30, 2023, the court entered an Order directing the clerk to administratively terminate the § 1983 action and docket Johnson's filings as a new matter to proceed under 28 U.S.C. § 2254. Id. (ECF No. 5).

Johnson's filings allege he was originally convicted in 2001, in the New Kent County Circuit Court of capital murder and conspiracy to commit capital murder. While Johnson's filings do not state the sentence he received for these convictions, his prior habeas actions reveal he was sentenced to serve a prison term of life without the possibility of parole and twenty years on the respective counts. His current § 2254 petition challenges the same

2001 convictions and sentences that he previously challenged in Civil Action Nos. 2:05cv510, 2:07cv358, 2:16cv100, and 2:18cv193. Thus, his current petition appears to fall under the successive petition provisions of the federal habeas statute.

The matter was referred to the undersigned pursuant to the provisions of 28 U.S.C. §§ 636(b)(1)(B) and (C) and Rule 72(b) of the Federal Rules of Civil Procedure.

Pursuant to 28 U.S.C. § 2244(b)(3)(A), "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." This court has not received an order from the Court of Appeals for the Fourth Circuit authorizing the consideration of Petitioner's application for a writ of habeas corpus, nor does it appear from any of the filings that Petitioner has moved for such an order. Therefore, this court is precluded from considering Petitioner's application for a writ of habeas corpus.

By Show Cause Order entered December 19, 2023 (ECF No. 10) the court directed Petitioner to show cause within 30 days why this matter should not be dismissed as a successive petition. Johnson filed a response asserting various objections in response to the Show Cause Order. (ECF No. 11). However, his response does not

allege any basis to permit a successive filing on the grounds he has alleged in this court.

Because Johnson's petition attacks the convictions he previously challenged in his prior petitions without receiving leave from the Fourth Circuit, this report RECOMMENDS that Johnson's petition be DISMISSED for lack of jurisdiction as successive under 28 U.S.C. § 2244(b)(3)(A).

By copy of this report and recommendation, the parties are notified that pursuant to 28 U.S.C. § 636(b)(1)(C):

1. Any party may serve upon the other party and file with the Clerk written objections to the foregoing findings and recommendations within fourteen (14) days from the date this report is forwarded to the objecting party by Notice of Electronic Filing or mail, see 28 U.S.C. § 636(b)(1), computed pursuant to Rule 6(a) of the Federal Rules of Civil Procedure. Rule 6(d) of the Federal Rules of Civil Procedure permits an extra three (3) days, if service occurs by mail. A party may respond to any other party's objections within fourteen (14) days after being served with a copy thereof. See Fed. R. Civ. P. 72(b)(2) (also computed pursuant to Rule 6(a) and (d) of the Federal Rules of Civil Procedure).

2. A district judge shall make a de novo determination of those portions of this report or specified findings or recommendations to which objection is made.

Petitioner is further notified that failure to file timely objections to the findings and recommendations set forth above will result in a waiver of appeal from a judgment of this court based on such findings and recommendations. Thomas v. Arn, 474 U.S. 140 (1985); Carr v. Hutto, 737 F.2d 433 (4th Cir. 1984); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

The Clerk is DIRECTED to mail a copy of this Report and Recommendation to the Petitioner and provide an electronic copy to counsel for Respondent.

/s/ 

Douglas E. Miller
United States Magistrate Judge

DOUGLAS E. MILLER
UNITED STATES MAGISTRATE JUDGE

Norfolk, Virginia

January 30, 2024

Clerk's Mailing Certificate

A copy of the foregoing was mailed this date to:

Dwayne L. Johnson, (#1059153)
VA DOC Centralized Mail Distribution Center
3521 Woods Way
State Farm, VA 23160

and an electronic copy was provided to:

Donald Eldridge Jeffrey, III
Office of the Attorney General
202 North 9th Street
Richmond, VA 23219

Fernando Galindo, Clerk

By /s/ J. L. Meyers
Deputy Clerk

January 30, 2024